STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission on its own motion	)	
	)	Docket No. 01-0705
Northern Illinois Gas Company d/b/a NICOR Gas Company	)	
Reconciliation of Revenues collected under Gas Adjustment Charges with Actual Costs prudently incurred	)	
Illinois Commerce Commission on its own motion	)	
	)	Docket No. 02-0067
Northern Illinois Gas Company d/b/a NICOR Gas Company	)	
Proceeding to review Rider 4, Gas Cost, pursuant to Section 9-244(c) of the Public Utilities Act	)	
Illinois Commerce Commission on its own motion	)	
	)	Docket No. 02-0725
Northern Illinois Gas Company d/b/a NICOR Gas Company	)	
Reconciliation of Revenues collected under Gas Adjustment Charges with Actual Costs prudently incurred	)	

REPLY BRIEF IN SUPPORT OF VERIFIED MOTION FOR RULING ON USE OF DISCOVERY DEPOSITION TRANSCRIPTS IN PRE-FILED TESTIMONY

Northern Illinois Gas Company d/b/a Nicor Gas Company ("Nicor Gas" or the "Company") hereby respectfully submits this Reply Brief in Support of its Verified Motion for Ruling on Use of Discovery Deposition Transcripts in Pre-Filed Testimony pursuant to a schedule set by the Administrative Law Judges ("ALJs").

I.
Introduction

Staff and the Intervenors have not supported their unilateral attempt to introduce wholesale quotations from the discovery depositions through their opinion witnesses in this proceeding. Staff and the Intervenors have not offered a single case, either before the Commission or in the courts, in which an opinion witness has been allowed to quote *at all* from discovery deposition testimony, much less read lengthy excerpts from deposition transcripts into the evidentiary record. As stated in its initial Memorandum, the Company is unaware of any such practice or authority, which would be contrary to the purpose of a discovery deposition and materially harmful to the integrity of the evidentiary record.

The arguments of Staff and the Intervenors fail at every level. At the most basic level, Staff and the Intervenors have failed to show that the hearsay information contained in the discovery depositions introduced through their opinion witnesses is of a type customarily relied upon and reasonably trustworthy, and that it is not more probative than prejudicial.

Staff and the Intervenors argue that their verbatim discovery deposition quotations are indistinguishable from written data request responses, and are, therefore, reliable. (Staff Resp., p. 6; CUB Resp., pp. 8-9). As a preliminary point, as discussed in detail below, these parties misstate the general rule on the introduction of hearsay through opinion testimony in Commission proceedings, which limits the introduction of written hearsay in support of opinion testimony. 83 Ill. Admin. Code § 200.610(b); *Metro Utility v. Ill. Commerce Comm'n*, 193 Ill. App. 3d 178, 184-86, 549 N.E.2d 1327, 1331-32 (2d Dist. 1990). More pointedly, however, Staff and the Intervenors ignore the one-sided nature of a discovery deposition in which a deponent is compelled to respond to irrelevant or otherwise improper questions, which would be

subject to objection and no response in written discovery. In short, the discovery deposition testimony is unreliable as offered by Staff and the Intervenors.

Additionally, these parties assert that the testimony given should be deemed reliable and admissible because it was given under oath. However, it is not the truthfulness of the testimony given that is at issue, but rather the biased and one-sided nature of the examination, which is intended to facilitate discovery—not to preserve testimony for hearing. Illinois recognizes that discovery depositions are distinct from evidence depositions and ordinarily inadmissible absent an exception to the hearsay rule. Ill. Sup. Ct. R. 212; *Skonberg v. Owen-Corning Fiberglas Corp.*, 215 Ill. App. 3d 735, 749, 576 N.E.2d 28, 36-37 (1st Dist. 1991). This distinction also formed the basis for the Alaska PUC's determination in *In re Matter of Tariff Revision*, in which the Alaska PUC disallowed the use of wholesale quotations from discovery depositions in favor of information "gleaned" from the examinations. *In re Matter of Tariff Revision*, Docket No. U-01-108, 2002 Alas. PUC LEXIS 469, at *6-11 (Alaska Pub. Util. Comm'n Sept. 24, 2002). Staff and the Intervenors do not successfully distinguish this case, and their arguments that the Alaska PUC somehow lends credence to their approach in this case is not supported on the face of that decision.

The introduction of discovery deposition testimony through Staff's and the Intervenors' opinion witnesses is also clearly more prejudicial than probative, as evidenced by the very arguments raised by these parties in their responses. Staff and the Intervenors assert that the ALJs should not consider the prejudice inherent in their witnesses' wholesale quoting of the discovery deposition transcripts because Nicor Gas, in their view, should rebut the selected information presented as a *factual matter* by sponsoring some or all of the deponent witnesses in this proceeding. This argument ignores the fact that Nicor Gas is not in a position to sponsor all

of the deponents because several individuals who were deposed are not employees of the Company. More importantly, however, Nicor Gas is not and should not be required to rebut hearsay "facts" offered by Staff's and the Intervenors' opinion witnesses—as opposed to rebutting the soundness of the opinions given by Staff's and the Intervenors' witnesses. The law is clear on this point. Opinion witnesses may not provide factual testimony. Instead, the only purpose for which Staff's and the Intervenors' witnesses may introduce hearsay through their opinion testimony is as non-substantive supporting matter. *City of Chicago v. Anthony*, 136 Ill. 2d 169, 185-86, 554 N.E.2d 1381, 1389 (1990); *In re Commonwealth Edison Co*., Docket No. 90-0038, 1990 WL 508139, at *18 (Ill. Commerce Comm'n Dec. 12, 1990).

Staff and CUB try to avoid this limitation by arguing that the quotations from the discovery deposition transcripts may be introduced into evidence by Staff's and the Intervenors' opinion witnesses under the "admissions" exception to the hearsay rule. But just like any other substantive evidence, party admissions cannot be put into evidence through opinion testimony. *See* Michael H. Graham, *Cleary & Graham's Handbook of Illinois Evidence* § 802.1, at 662 (8th ed. 2004). Staff and CUB offer no case law contradicting this basic rule, and the Company is aware of none.

Significantly, Cook County recognizes this basic principle and acknowledges that its expert opinion witness cannot provide factual testimony. Nevertheless, Cook County attempts to sidestep this rule by asserting that "(t)he quotes are not being offered as substantive evidence for the truth of the matter asserted but to provide context and explain the basis of the opinions." (Cook County Resp., p. 3). Additionally, in discussing the admission exception to the hearsay rule, Cook County states: "[T]he deposition excerpts may ultimately be admitted *elsewhere* in this proceeding as an admission." (Cook County Resp., p. 8) (*emphasis provided*). However,

the fact is that the excerpts have not yet been offered by any party, let alone admitted into evidence. As a result, the question of whether any of the discovery deposition testimony would be admissible as a party admission is not before the ALJs at this juncture—and the deposition excerpts therefore cannot be used by Staff's and the Intervenors' opinion witnesses as if they had already been admitted.

Further, Cook County's assertion that the deposition quotes are not being offered as substantive evidence for the truth of the matter asserted is unconvincing because it directly contradicts CUB's statements regarding the same witness, Mr. Jerome Mierzwa. In its Response, CUB repeatedly states that the verbatim quotes are being provided as "evidence" for the Commission to rely upon. (*See, e.g.*, CUB Response, p. 5). The fact that Cook County and CUB cannot agree as to the purpose of their own witness's verbatim deposition quotations undermines the credibility of their respective arguments. As such, their argument that confusion is not created and that the Commission can distinguish between the facts offered by their opinion witnesses and the actual substantive facts that have been admitted into evidence lacks merit because they themselves cannot do so.

II.
Argument

A. Staff And The Intervenors Have Not Shown That The Hearsay Discovery Deposition Testimony May Be Admitted In The Manner Presented In Support Of Their Opinion Witnesses' Testimony

Illinois law is clear that hearsay, such as the discovery deposition testimony at issue here, is inadmissible in administrative proceedings absent an exception to the hearsay rule. *See Jackson v. Bd. of Review of Dep't of Labor*, 105 Ill. 2d 501, 504, 475 N.E.2d 879, 883 (1985); *Grand Liquor Co., Inc. v. Dep't of Revenue*, 67 Ill. 2d 195, 199, 367 N.E.2d 1238, 1240 (1977); *Novick v. Dep't of Finance*, 373 Ill. 342, 344, 26 N.E.2d 130, 131 (1940). While the

Commission has promulgated Rule 200.610(b) as a "catch-all" exception to the hearsay rule, 83 Ill. Admin. Code 200.610(b); *see* 5 ILCS 100/10-40(a), this exception is narrowly construed to protect against the admission of unreliable and/or prejudicial evidence. *See In re Commonwealth Edison Co.*, Docket No. 90-0038, 1990 WL 508139, at *18 (Ill. Comm. Comm'n Dec. 12, 1990) (rejecting party's argument that the Commission could consider evidence under the hearsay exception stated in the Rules of Practice where evidence did not "possess a high degree of reliability" and was not "of the type that a reasonably prudent person would rely on").

However, before any hearsay used to form an expert's opinion will be admitted, the proponent of admitting such hearsay must show that (1) the information is of a type customarily relied upon and reasonably trustworthy, and (2) the information does not run afoul of other evidentiary requirements. *See City of Chicago v. Anthony*, 136 Ill. 2d 169, 185-86, 554 N.E.2d 1381, 1389 (1990); *Rios v. City of Chicago*, 331 Ill. App. 3d 763, 770-72, 771 N.E.2d 1030, 1036-38 (1st Dist. 2002); *In re Commonwealth Edison Co.*, 1990 WL 508139, at *18 (excluding hearsay in expert testimony on prejudice grounds). Here, Staff and the Intervenors have failed to show that discovery deposition testimony quoted by their opinion witnesses meets either prong of this well-established admissibility standard.

1. The Discovery Depositions Are Neither Customary Nor Reliable In Evidence As Offered By Staff And The Intervenors

Staff and the Intervenors assert that the ALJs should allow their witnesses to quote without limitation from the discovery depositions transcripts because the discovery depositions in their view are "analogous" to written data request responses and are, therefore, "inherently reliable." (Staff Resp., p. 6; CUB Resp., pp. 8-9). This argument fails on its face because discovery depositions are inherently different from written data request responses.

As a preliminary matter, depositions are extraordinary discovery in Commission proceedings (*see* 83 Ill. Admin Code § 200.340) and as infrequent in practice as the Commission's stated policy discouraging depositions implies. That policy discourages depositions in favor of written discovery because, in order to obtain a deposition subpoena, a party must demonstrate that the information sought could not be obtained through written discovery. *See* 83 Ill. Admin. Code § 200.380.

Further, a discovery deposition is less likely to reflect either a careful examination or a well-considered response than written discovery. For example, in Commission practice, a party receiving data requests has a reasonable opportunity, usually 28 days, to consider the requests and to respond appropriately. *See* 83 Ill. Admin. Code § 200.410. If the party believes the requests are inappropriate, it can object and decline to respond. The ground rules for a discovery deposition are quite different. The deponent is afforded virtually no opportunity to consider the questions posed or to respond appropriately. Critically, the deponent must respond to the questions no matter how objectionable, except in the limited circumstance where the examiner seeks to elicit privileged information.

Staff and the Intervenors also argue that the deposition testimony offered by their opinion witnesses should be deemed reliable, and therefore admissible, because the depositions were given under oath. (Staff Resp., pp. 5-6; CUB Resp., p. 9). This argument also misses the mark because the veracity of the testimony given is not at issue here. Rather, the problem of reliability rests with the biased and one-sided nature of the examination at the depositions.

As noted in Nicor Gas' Memorandum in support of its Motion, Illinois is unique in distinguishing between discovery and evidence depositions. This distinction recognizes that discovery depositions are intended to facilitate discovery, and not to preserve testimony for

hearing. *See Ainsworth Corp. v. Cenco Inc.*, 158 Ill. App. 3d 639, 646, 511 N.E.2d 1149, 1153-54 (1st Dist. 1987); *In re Estate of John D. Rennick*, 181 Ill. 2d 395, 401, 692 N.E.2d 1150, 1154 (1998). As discovery depositions are distinct from evidence depositions, they are ordinarily inadmissible absent an exception to the hearsay rule. Ill. Sup. Ct. R. 212; *Skonberg v. Owen-Corning Fiberglas Corp.*, 215 Ill. App. 3d 735, 749, 576 N.E.2d 28, 36 (1st Dist. 1991).

The distinction between discovery depositions and affirmative evidence also formed the basis for the Alaska PUC's determination in the decision *In re Matter of Tariff Revision*, in which the Alaska PUC disallowed the use of wholesale quotations from discovery depositions in favor of information "gleaned" from the examinations. *In re Matter of Tariff Revision*, Docket No. U-01-108, 2002 Alas. PUC LEXIS 469, at *6-11 (Alaska Pub. Util. Comm'n Sept. 24, 2002). Staff's and the Intervenors' argument that the Alaska PUC somehow lent credence to their approach in this case is not supported on the face of that decision, in which the Alaska PUC struck the deposition testimony offered in its entirety and expressly distinguished between discovery deposition testimony and written discovery responses. *Id*. Indeed, CUB misquotes the Alaska PUC's holding to cast that holding in favor of CUB's position. While the Alaska PUC actually stated "[w]e expect the parties to review *discovery responses* and include selected excerpts of the responses in prefiled testimony and exhibits," 2002 Alas. PUC LEXIS 469, at *9, CUB has quoted the Alaska PUC as stating "[w]e expect the parties to review *discovery depositions* and include selected excerpts." (CUB Resp., p. 9) (*emphasis provided*). CUB's direct misstatement of the Alaska PUC's holding is indicative of these parties' unsupported reliance on this decision and their misguided notion about the proper use of deposition testimony by an opinion witness.

Moreover, these arguments misstate the general rule on the introduction of hearsay through opinion testimony in Commission proceedings. As set forth above, and in Nicor Gas's Memorandum in support of its Motion, while exceptions to the hearsay rule are available under the Commission's Rules of Practice and other applicable law, these exceptions are narrowly construed to protect against the admission of unreliable and/or prejudicial evidence. Specifically, CUB and Staff repeatedly assert that its experts are entitled to rely on the deposition transcripts. (Staff Resp., pp. 3-4, 8; CUB Resp., pp. 3-4). Nicor Gas agrees with this point. However, rather than relying upon this discovery to support admissible opinions, Staff and the Intervenors are attempting to use this narrow exception to funnel 77 pages of deposition excerpts into evidence—as if the carefully selected quotations somehow represent an objective and unbiased presentation of the subject matter addressed.

The verbatim discovery deposition excerpts of Staff's and the Intervenors' witnesses transcend the narrow exception that Staff and CUB rely upon. Rather than simply using the underlying information to support their witnesses' opinions, these witnesses' direct and extensive quotations from the deposition transcripts betray the true purpose for which the hearsay information is being offered. In particular, the selected excerpts from the transcripts could be (and, with all due respect, apparently are intended to be) mistaken for substantive evidence, although they are not and cannot be considered as such. *City of Chicago*, 136 Ill. 2d at 185-86, 554 N.E.2d at 1389; *Rios*, 331 Ill. App. 3d at 770-72, 771 N.E.2d at 1036-38; *Commonwealth Edison Co*., 1990 WL 508139, at *18.

Staff and CUB attempt to take a narrow exception to the hearsay rule and expand it to a point that undermines the basis for having a hearsay rule in the first place. The Commission already has determined that it will not expand upon this well-considered limitation under the

provisions of Section 200.610(b). *Commonwealth Edison Co*., 1990 WL 508139, at *18 (Rule 200.610(b) to be narrowly construed). The ALJs should refrain from doing so in this case.

It also should be noted in connection with this argument that CUB asserts that the opinion witnesses should be allowed to rely on the deposition transcripts, just as they would be allowed to rely on affidavits of company employees. (CUB Resp., p. 8). In making this assertion, CUB relies on Illinois Supreme Court Rule 212(a)(4), which allows for discovery depositions to be used for any purpose for which an affidavit may be used. However, CUB ignores the fact that the opinion witnesses have gone far beyond merely "relying" on the deposition testimony, and have attempted to introduce wholesale quotations from the discovery depositions into evidence. Under the well-established law set forth above, this simply is improper and illegal.

2. The Inescapable Prejudice In Staff's And The Intervenors' Use Of The Discovery Depositions Is Manifest In Their Own Arguments

Staff and the Intervenors assert that the record in this proceeding will not be harmed by the wholesale introduction of hearsay through their opinion witnesses because (1) Nicor Gas has the opportunity to "rebut" the facts offered by their opinion witnesses by sponsoring the deponents as witnesses, or (2) the ALJs and/or the Commission can distinguish between the facts offered by their opinion witnesses and the actual substantive facts in evidence.

On the first argument, as a preliminary matter, Nicor Gas notes that it is not in a position to sponsor all of the various deponents as company witnesses in this proceeding because several of the individuals who voluntary agreed to provide their discovery depositions are not Company employees and were not employed by the Company at the time of their depositions.

Furthermore, the Company is not and should not be required in this proceeding to rebut hearsay "facts" offered by Staff's and the Intervenors' opinion witnesses. In this respect, Staff's

and the Intervenors' argument betrays the impossibility of their position and determination to introduce discovery deposition testimony through their opinion witnesses as substantive factual evidence. The law is unequivocal, however, that supporting matters admitted through opinion testimony cannot be considered as substantive facts. *City of Chicago*, 136 Ill. 2d at 185-86; *Commonwealth Edison Co*, 1990 WL 508139, at *18. This bulwark evidentiary rule is not a "Catch-22," as Cook County asserts, it is essential to the integrity of the truth-seeking process. Importantly, Nicor Gas is not seeking to preclude Staff's and the Intervenors' witnesses from using information obtained in the discovery depositions in support of their opinions. To the extent these parties' witnesses' properly reference and/or summarize the discovery deposition testimony of certain individuals in support of the opinions these witnesses are offering, then Nicor Gas may or may not cross-examination these witnesses on such bases. In that event, the discovery deposition transcripts would be available to impeach and/or rehabilitate the witnesses. Ill. Sup Ct. R. 212.

On the second argument, Nicor Gas strongly renews its initial argument that the ALJs and the Commission should not be required to parse the evidentiary record to try to understand what is competent factual matter and what is not. The transparency of the record is essential to a determination on the merits because the Commission must base its decision "exclusively on the record for decision." 220 ILCS 5/10-103; *see also Bus. & Prof'l People for Pub. Interest v. Ill. Commerce Comm'n*, 136 Ill. 2d 192, 233-34, 555 N.E.2d 693, 712 (1990) (holding that Commission's order was reversible where it was not supported by substantial evidence based on the record). The fact that Staff and the Intervenors have submitted briefs in which they repeatedly confuse the proper use of discovery deposition testimony in support of their witnesses' opinions with the use of such deposition testimony as substantive evidence only

serves to highlight the need for the ALJs to limit the use of verbatim excerpts from the discovery deposition transcripts at this juncture in order to promote the development of a record based upon competent evidence.

B. Staff's And the Intervenors' Opinion Witnesses May Not Introduce The Discovery Deposition Testimony As Substantive Evidence As "Admissions" By Nicor Gas

Staff and CUB raise the novel argument that quotations from the discovery deposition transcripts may be offered through their opinion witnesses' testimony and introduced into evidence over the hearsay rule as "admissions" by Nicor Gas. However, Staff and CUB have offered no case law in support of this argument, and the Company is aware of none.

Indeed, the law holds that the only purpose for which Staff's and the Intervenors' witnesses may introduce hearsay through their opinion testimony is as non-substantive supporting matter. *City of Chicago*, 136 Ill. 2d at 185-86, 554 N.E.2d at 1389; *Rios*, 331 Ill. App. 3d at 770-72, 771 N.E.2d at 1036; *Commonwealth Edison Co*., 1990 WL 508139, at *18. Party admissions, however, are substantive evidence. *See* Michael H. Graham, *Cleary & Graham's Handbook of Illinois Evidence* § 802.1, at 662 (8th ed. 2004). Staff and CUB simply cannot argue that the discovery deposition testimony is properly offered both in support of their opinion witnesses' testimony and in the form of party admissions by Nicor Gas. It is notable that Cook County does not join in Staff's and CUB's incongruous argument, correctly recognizing that its opinion witness, Mr. Mierzwa, would be incompetent to offer the discovery deposition transcripts into evidence. Cook County explicitly asserts that "the deposition excerpts may ultimately be admitted *elsewhere* in this proceeding as an admission." (Cook County Resp., p. 8) (*emphasis provided*).

While the law provides procedures and authority for the introduction of discovery deposition testimony offered as a party admission, such procedures do not include introducing such substantive facts through a party's opinion witnesses. *See Skonberg v. Owen-Corning Fiberglas Corp.*, 215 Ill. App. 3d 735, 749, 576 N.E.2d 28, 36-37 (1st Dist. 1991); *In re Estate of John D. Rennick*, 181 Ill. 2d 395, 401-05, 692 N.E.2d 1150, 1154-56 (1998). In the ordinary course, admissions made during a discovery deposition, if allowed by stipulation or over an opponent's objection, are read directly into the record by counsel. *Skonberg*, 215 Ill. App. 3d at 749, 576 N.E.2d at 36. Such a procedure promotes the efficiency of the trial or hearing process because the parties are permitted to submit arguments on the proposed admissions to be introduced, and the use of such admissions may be ruled upon as part of the pre-trial or pre-hearing procedure.

In the event an admission made during a discovery deposition is allowed, the Rule of Completeness applies and the party offering the discovery deposition testimony is required to include additional portions of the transcript identified by its opponent to ensure a complete and accurate presentation. Ill. Sup. Ct. R. 212(c); *Herron v. Anderson*, 254 Ill. App. 3d 365, 375, 626 N.E.2d 1035, 1043 (1st Dist. 1993). Clearly, the Rule of Completeness also promotes the efficiency of the trial or hearing process by favoring disclosure of evidence in context.

On a related note, if Staff and the Intervenors choose to properly move to introduce the discovery deposition testimony as party admissions by Nicor Gas, then they certainly will have no need to call the deponents as adverse witnesses in the proceeding, which they have indicated they intend to do. Assuming that Staff and the Intervenors wish to introduce excerpts from the discovery depositions as party admissions, and further assuming that these parties satisfy their burden of making an individual showing that each such excerpt constitutes an admission, counsel

for Staff and the Intervenors will then be allowed to read those admissions directly into the record as substantive evidence. Once counsel for Staff or the Intervenors have read all such excerpts that were properly determined to be admissions by the ALJs into the record, the need for the deponents to appear as adverse witnesses to testify to the very same matters contained within the admissions is obviated. Introduction of the discovery deposition testimony as party admissions in addition to presenting testimony by the deponents as adverse witnesses would further disturb the efficiency of the hearing process with unnecessarily cumulative evidence.

Most importantly, however, the admissibility of any of the discovery deposition testimony over the hearsay rule on the basis that the testimony given is a party admission is not before the ALJs at this juncture. Thus, Staff and CUB simply cannot argue that they have properly introduced the discovery deposition testimony through their opinion witnesses' testimony because these opinion witnesses are incompetent to introduce substantive evidence such as admissions by Nicor Gas.

C. The Discovery Deposition Testimony May Not Be Introduced By Staff's And The Intervenors' Opinion Witnesses Under the State of Mind Exception To The Hearsay Rule

Staff continues to undermine its own arguments that the discovery deposition testimony was properly introduced through the opinion witnesses by asserting that the excerpted statements "are excepted from the hearsay rule if they are offered to show the state of mind of Nicor's employees." (Staff Resp., p. 3). In the first instance, Staff does not even take the position that it is offering the deposition testimony under the state of mind exception to the hearsay rule. Further, the state of mind exception to the hearsay rule has no relevance to the issue currently before that ALJs as to whether Staff and the Intervenors have properly introduced excerpts from discovery depositions in their opinion witnesses' testimony. The fact of the matter is that by

introducing the deposition excerpts as underlying support for its witnesses' opinions, Staff has foreclosed itself from arguing that these excerpts can come in as evidence under an exception to the hearsay rule. As with the failed argument regarding the treatment of the excerpts as party admissions, the state of mind exception to the hearsay rule simply never comes into play here where the underlying basis of witnesses' opinions is not substantive evidence.

A review of the parameters of the state of mind exception further demonstrates the irrelevance of this exception to the issue now before the ALJs: "An out of court statement of a declarant is admissible when that statement tends to show the declarant's state of mind at the time of the utterance. A statement qualifies under the state of mind exception to the hearsay rule when it purports to relate to a condition of mind existing at the time the statement is made and when it was made under circumstances indicating apparent sincerity." *Horace Mann Ins. Co. v. Brown*, 236 Ill. App. 3d 456, 462, 603 N.E.2d 760, 765 (1st Dist. 1992). The state of mind of the deponents at the time of their depositions has no bearing on any of the issues present in this proceeding. Thus, Staff cannot rely on the argument that the discovery depositions are admissible under the state of mind exception to the hearsay rule to show that it has properly included excerpts from the discovery depositions in its opinion witnesses' pre-filed testimony.

IV.
Conclusion

Staff and the Intervenors have failed to meet Nicor Gas's argument that verbatim excerpts from the discovery depositions were improperly included in their witnesses' pre-filed opinion testimony. As shown above, and in Nicor Gas's initial Memorandum, the request by Nicor Gas to limit the use of verbatim excerpts from the discovery deposition transcripts will protect all parties' interest in a fair and efficient proceeding and in development of a record

based upon competent evidence, and Nicor Gas respectfully asks the ALJs to grant its Verified Motion for Ruling on Use of Discovery Deposition Transcripts in Pre-Filed Testimony.

Dated: February 25, 2004

Respectfully submitted,

NORTHERN ILLINOIS GAS COMPANY
D/B/A NICOR GAS COMPANY

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CERTIFICATE OF SERVICE

I, Michael Guerra, hereby certify that I served a copy of Northern Illinois Gas Company d/b/a Nicor Gas's Reply Brief in Support of Verified Motion for Ruling on Use of Discovery Deposition Transcripts in Pre-Filed Testimony upon the service list in consolidated Docket Nos. 01-0705/02-0067/02-0725 by email on February 25, 2004.

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Michael Guerra